

## Hey You Get Off My Server

By Scott M. Hervey

On December 10, 2001, in *Intel Corporation v. Hamidi*, the California Court of Appeals upheld the trial court's issuance of an injunction preventing a former employee from sending unsolicited e-mail to addresses on the former employer's computer system. Some commentators heralded the decision as the natural evolution of common law principals for disputes involving the Internet. Others saw the decision as a strained attempt to fashion a remedy for conduct that the court found distasteful but may not have been actionable.

On March 27, 2002 the California Supreme Court granted cert. The question is whether the Supreme Court will take this opportunity to reign in the application of trespass to chattels (and other common law claims) to Internet disputes, or encourage the expansion of common law claims into this area.

*Intel v. Hamidi* involved a former Intel employee who, after being terminated, launched a website <face-intel.com> for the purported purpose of providing a medium for Intel employees to air their questions and concerns over employment conditions at Intel. In the course of providing this open discourse for Intel employees, Hamidi also sent six e-mailings to between 8,000 and 35,000 employees through Intel's "internal, proprietary, email system." Only 450 requested to be removed from Hamidi's e-mail list.

Intel sent a letter to Hamidi requesting that he stop, but Hamidi refused. Intel also claimed that Hamidi took steps to evade technical measures instituted to prevent him from sending e-mail to Intel employees. According to Intel, its employees "spent significant amounts of time attempting to block and remove Hamidi's email from the Intel computer system."

Intel filed a complaint and sought relief based on the theory of trespass to chattels. The trial court granted Intel's motion for summary judgment and issued an injunction barring Hamidi from sending unsolicited e-mail to addresses on Intel's computer system. Hamidi appealed. The application of the theory of trespass to chattel to disputes in cyberspace is a relatively new phenomenon. The first such application of this ancient theory for relief was in *CompuServe, Inc. v. Cyber Promotions* where CompuServe sued to prevent the defendant from sending a daily barrage of spam to CompuServe users. *America Online, Inc. v. IMS* followed shortly thereafter and involved relatively the same set of facts. In both of these cases, trespass was found because of the drain on resources and processing power of the plaintiffs' system caused by the defendants' mass spam mailings. The courts found that the plaintiffs were harmed by the time spent processing the unwanted e-mail and the burden to the computer equipment it caused.

Trespass to chattel was subsequently applied in the federal district court case *eBay v. Bidder's Edge*. There, eBay sued Bidder's Edge for its use of "rude robots" that scoured eBay's site and aggregated information. eBay presented evidence that the defendant's robots represented between 1 to 2% of the load on its system and, while that amount would not be significant enough to support a conversion claim, it was enough of an interference with the system to constitute trespass. The court also noted that, unless enjoined, the Bidder's Edge robots would encourage other unauthorized robots to trawl eBay's site which could have the combined affect of causing substantial reduced system performance and even system unavailability to eBay customers.

The majority of the court in *Hamidi* found that Intel had shown trespass to chattel. The court noted that a trespass to chattel is actionable per se without proof of actual damages; any authorized touching or moving of a channel is actionable even though no harm ensues. But to recover more nominal damages, the Plaintiff must show the value of the property taken or that he has sustained

some special damages. As for Intel, the court noted that even assuming Intel had not demonstrated sufficient “harm” to trigger entitlement to nominal damages, it showed that Hamidi was disrupting its business by using its property, causing loss of productivity of thousands of employees distracted from their work, and had caused its security department to spend a good deal of time trying to stop the e-mails and therefore was entitled to injunctive relief based on the theory of trespass to chattel.

The dissenting opinion and amicus ACLU and Electronic Frontier Foundation raised interesting points with respect to the nature of the harm Intel allegedly suffered. While all acknowledged that common law doctrines evolve and adapt to new circumstances, they insisted that the foundational elements must remain the same. As for trespass to chattel, the dissenting opinion noted that Intel was still required to prove some injury to the chattel or at least to the possessory interest in the chattel. But, the only injury claimed by Intel, was the time spent by its employees reading a single e-mail. The dissent pointed out that the other decisions applying trespass to chattel with respect to the Internet have done so where the plaintiff has been able to prove that the transmittal of unsolicited bulk e-mail or the unauthorized search and retrieval of information from the plaintiff's database placed a burden on the computer system thereby reducing its capacity and slowing system performance. Both the dissenting opinion and amicus pointed out that no case has yet to hold that reading an unsolicited message transmittal to a computer screen constitutes an injury that forms the basis for trespass to chattel.

Had Hamidi's conduct consisted of only sending six separate emails during the course of two years? The majority opinion clearly believed otherwise, noting that Hamidi, on six separate occasions, sent emails to between 8,000 and 35,000 Intel employees. Yet, the dissenting opinion argued that Intel was not dispossessed, even temporarily, of its e-mail system by reason of receipt of Hamidi's e-mail; the e-mail system was not impaired as to its condition, quality or value and no actual harm was caused to a person or thing in which Intel had a legally protected interest. The majority also suggests that injury to Intel resulted due to loss of productivity caused by the thousands of employees distracted from their work and by the time its security department spent trying to halt the incoming messages. However, as the dissenting opinion and amicus briefs note, the net effect was just one additional e-mail in a mail server inbox.

Trespass to chattel had been looked upon as the new panacea for parties on the receiving end of unwanted Internet conduct such as spamming, hacking, rude robots and spiders. Under such a claim, the plaintiff is entitled to an injunction without having to show injury, or complete loss of use of the chattel (database, server, etc). The party need only show that it was deprived of use of the chattel for a substantial time. The Supreme Court's decision in this case could have an impact on the use of the Internet and e-mail. If the court requires proof of a higher degree of injury then has been shown, businesses might only be able to rely on technology to filter out unwanted incoming spam, spiders or robots. However, if the court upholds the lower court's ruling, one may be able to claim that the time spent responding to allegedly trespassory conduct satisfies the tort's injury requirement, despite the fact that the value of the chattel or the user's ability to use the chattel remain unaffected.

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